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No. 08-322

IN THE
Supreme Court of the United States

NORTHWEST AUSTIN MUNICIPAL
UTILITY DISTRICT NUMBER ONE,

Appellant,

v.

ERIC H. HOLDER, JR., ATTORNEY
GENERAL OF THE UNITED STATES, ET AL.,

Appellees.

On Appeal from the United States
District Court for the District of Columbia

BRIEF OF DR. ABIGAIL THERNSTROM AND FORMER JUSTICE DEPARTMENT OFFICIALS AS *AMICI CURIAE* IN SUPPORT OF APPELLANT

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STATEMENT OF INTEREST[1]

Dr. Abigail Thernstrom and former Justice Department officials submit this brief *amici curiae* in support of Appellant.

Dr. Abigail Thernstrom is an adjunct scholar at the American Enterprise Institute and Vice Chair of the U.S. Commission on Civil Rights. She is presenting her personal opinion as an election law expert and not the Commission's views.

Former Justice Department officials include Joel Ard, Karl S. Bowers, Jr., Robert N. Driscoll, William Bradford Reynolds, and Hans A. von Spakovsky. All have served in the Department's Civil Rights Division and have extensive experience with the Voting Rights Act and the Department's enforcement policies.

The *amici curiae* have a substantial interest in eliminating the use of race as a factor in redistricting.

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[1] Counsel for all parties have consented to the filing of this brief, and those consents are on file with the Clerk's Office or filed contemporaneously with this brief. No counsel for a party in this case authored this brief in whole or in part, and no person or entity, other than *amici* and their counsel, has made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

When Congress reauthorized the Voting Rights Act in 2006, it did not merely extend the life of §5 for twenty-five years; it substantially altered the substantive requirements of that provision in a way that deliberately increases the pressure on covered jurisdictions to engage in race-based redistricting. Because the amended §5 now contains an "implicit command that States engage in presumptively unconstitutional race-based districting," *Miller v. Johnson*, 515 U.S. 900, 927 (1995), it cannot properly be regarded as "appropriate" legislation to "enforce" the Fourteenth or Fifteenth Amendments under *South Carolina v. Katzenbach*, 383 U.S. 301 (1966), or *Katzenbach v. Morgan*, 384 U.S. 641 (1966). The fundamental mistake of the court below was to assess a statute that plainly encourages States to use race in a way that at least potentially violates the Fourteenth Amendment right recognized in *Shaw v. Reno*, 509 U.S. 630 (1993), under the analysis employed in *Katzenbach* and *Morgan* for federal *prohibitions* against racially-tinged voting requirements. Moreover, *increasing* the substantive burdens on covered jurisdictions beyond those imposed on the South in the 1960s cannot rationally be viewed as a congruent and proportional effort to prevent discrimination.

Prior to the 2006 reauthorization, the Court took great care to interpret §5 in a way that would avoid the constitutional difficulties now created by Congress. In the face of persistent efforts by the Justice Department to find discriminatory purpose whenever a covered jurisdiction failed to *create*

additional race-based districts, even at the expense of traditional districting principles, the Court made clear that §5 applied only to the limited question of *retrogressive* purpose. *Reno v. Bossier Parish Sch. Bd.* (*Bossier II*), 528 U.S. 320, 329 (2000). Even though the Department's misinterpretation of §5's discriminatory "purpose" prong directly resulted in the racially-gerrymandered districts violative of *Shaw*, and even though the Court strongly warned that the Department's assessment of when majority-minority districts were required raised "serious constitutional concerns," *Miller*, 515 U.S. at 926, Congress in 2006 reauthorized the Department to require such districts under the "purpose" prong, thus ensuring that in the next redistricting cycle covered jurisdictions would again confront the conflicting demands of the Department and *Shaw*, in the manner that bedeviled redistricting in the 1990s.

Worse still, Congress significantly altered §5's substantive standard to prohibit any action with the "effect of *diminishing the ability* of [a minority group] . . . to *elect their preferred candidates of choice*," 42 U.S.C. § 1973c(b) (emphasis added), for the next three redistricting cycles, regardless of whether that diminution was necessitated by demographic changes or traditional districting principles. Congress created this guaranteed level of electoral success and representation for certain minority groups over the next three decades in order to overturn this Court's decision in *Georgia v. Ashcroft*, 539 U.S. 461 (2003). Congress emphatically rejected *Ashcroft*'s conclusion that, forty years after §5 was enacted, some covered jurisdictions should be "permitted to break up

districts where minorities form a *clear* majority of voters and replace them with vague concepts such as . . . coalition [districts]." S. Rep. No. 109-295, at 19-20 (2006) (emphasis added). Accordingly, Congress preserved in amber until 2031 all extant majority-minority districts (or other "electable" minority districts), regardless of changes in voting patterns or demographics, thus ensuring that these segregative and constitutionally problematic districts were not simply temporary transformative measures, but will be a permanent part of the electoral landscape until at least 66 years after §5 was enacted. Needless to say, this extraordinary mandate to use race in voting requires a far more searching judicial inquiry than asking (as the district court did) whether it was rational for Congress to believe that some vestiges of voting discrimination persisted in 2006. In all events, the fact that §5 now *undermines* the nondiscrimination guarantees of the Fourteenth and Fifteenth Amendments clearly means that it is not congruent and proportional to enforcing those amendments.

ARGUMENT

I. THE COURT HAS PREVIOUSLY INTERPRETED §5 SO AS TO AVOID SERIOUS CONSTITUTIONAL CONCERNS

A. *Boerne* And *Katzenbach* Do Not Apply To Laws Authorizing Racial Classifications

The court below found that §5 of the Voting Rights Act is a constitutional exercise of Congress's power under the enforcement clauses of the Fourteenth and Fifteenth Amendments, pursuant to the analysis employed in *Katzenbach*, 383 U.S. at 301, and

Morgan, 384 U.S. at 641, and, alternatively, under this Court's decision in *City of Boerne v. Flores*, 521 U.S. 507 (1997). This conclusion is wrong for all the reasons set forth by Appellant, but it is also plainly erroneous for a more fundamental reason. Namely, with respect to redistricting and similar vote-dilution claims, §5 is not a nondiscriminatory measure that prophylactically eliminates racial barriers to voting, like the laws at issue in *Morgan* and *Oregon v. Mitchell*, 400 U.S. 112 (1970), but, as substantially amended in 2006, is an affirmative requirement for States to create racial classifications of the sort that presumptively violate the Fourteenth Amendment under *Shaw*, 509 U.S. at 643-44.

That being so, the 2006 version of §5 is not properly regarded as "appropriate" legislation to "enforce" the Fourteenth or Fifteenth Amendments. As the Court explained in *Miller*, 515 U.S. at 927, if §5 contains an "implicit command that States engage in presumptively unconstitutional race-based districting," this "brings the Act, once upheld as a proper exercise of Congress' authority under §2 of the Fifteenth Amendment, *Katzenbach*, [383 U.S.] at 327, 337, into tension with the Fourteenth Amendment." Consequently, *Katzenbach*'s analysis would not support any such race-conscious version of §5 because, as the Court "recalled in *Katzenbach* itself, Congress' exercise of its Fifteenth Amendment authority . . . must 'consist with the letter and spirit of the constitution.'" *Id.* (quoting *Katzenbach*, 383 U.S. at 326).

Thus, a law that authorizes the creation of racial classifications is not assessed under the standards

established in *Katzenbach* or *Boerne* or, stated another way, is not deemed an appropriate exercise of Congress's enforcement power under the Reconstruction Amendments simply because it satisfies the tests set forth in those cases. Rather, racial classifications by States are permissible only if they are narrowly tailored to a compelling government interest, whether those classifications are enacted by States voluntarily or imposed on them by Congress. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 235 (1995).

Indeed, from the outset, the Court has recognized that laws that threaten the race-neutral guarantees of the Equal Protection Clause and the Fifteenth Amendment are not a proper exercise of Congress's enforcement power and are not adjudged by the same standards applied to statutes eliminating State practices that disproportionately burden certain racial groups. Thus, in *Morgan*, the Court reiterated that legislation is "'appropriate'" under Section 5 of the Fourteenth Amendment only if it "is consistent with 'the letter and spirit of the constitution,'" 384 U.S. at 651 (quoting *McCulloch v. Maryland*, 17 U.S. 316, 421 (1819)), and emphasized that the section "grants no power to restrict, abrogate, or dilute [the] guarantees" of that Amendment, *id.* at 651 n.10. It follows that "Congress has no power under the enforcement sections to undercut the Amendments' guarantees of personal equality and freedom from discrimination." *Mitchell*, 400 U.S. at 128 (opinion of Black, J.).

Thus, federal statutes that eliminate barriers to equal minority access, such as prohibitions against

"bonding" requirements in contracting that disproportionately burden minorities, *cf. City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 510 (1989), or a prohibition on literacy tests in voting, *see Morgan*, 384 U.S. at 658, are judged by a different, more lenient standard than laws that require States to establish contracting set-asides or that require race-based line drawing. The reasons for this differential treatment are self-evident.

Laws that impose burdens on States or infringe their autonomy, like the procedural aspects of §5 analyzed in *Katzenbach*, or that eliminate barriers to the ballot, such as the ban on the literacy test in *Morgan*, do not disadvantage or racially classify any citizen. Indeed, if anything, eliminating voting barriers benefits nonminorities by broadening the franchise. Thus, in situations where federal legislation overrides qualifications for voting because of their disparate racial impact, the only relevant constitutional interest is the State's interest in resisting congressional encroachment of its authority to establish voting qualifications. Since the validity of that encroachment turns on whether the federal statute prevents or remedies constitutional violations, that is the sum total of the inquiry.

In contrast, where federal statutes require or authorize States to establish racial classifications—such as contracting "goals" or race-based redistricting schemes—the relevant constitutional interest is the citizen's right to race-neutral treatment under the Equal Protection Clause, not just State autonomy. Consequently, the question is whether that personal right has been infringed, and that question turns on

whether the federal government has proved that the use of race is narrowly tailored to a compelling government interest. *Adarand*, 515 U.S. at 235. And, since "all governmental action based on race" is "a *group* classification long recognized as in most circumstances irrelevant and therefore prohibited," all such action must be "subjected to detailed judicial inquiry to ensure that the *personal* right to equal protection of the laws has not been infringed." *Id.* at 227 (internal quotation marks omitted). Accordingly, when Congress uses such an "inherently suspect" classification, *Miller*, 515 U.S. at 904 (internal quotation marks omitted), it is subject to far more vigorous judicial scrutiny than that applied to determine whether Congress has exceeded a delegated power—whether under the Necessary and Proper Clause or the enforcement clauses. Simply put, federal laws encouraging or requiring States to *use* racial classifications are subject to far more judicial skepticism and detailed scrutiny than federal laws *prohibiting* States from using devices with a racial impact or purpose.

Moreover, a federal law that presumptively *violates* the substantive commands of the Fourteenth or Fifteenth Amendments plainly cannot be legislation that "enforces," or is "appropriate" under, those Amendments, unless the government can rebut the presumption by satisfying the daunting requirements of strict scrutiny. Indeed, the Court has made clear that racial classifications imposed on States by Congress pursuant to Section 5 of the Fourteenth Amendment are just as suspect as voluntarily adopted State classifications, precisely

because it makes no sense to conclude that a "law that is an equal protection violation when enacted by a State" can somehow "become[] transformed to an equal protection guarantee when enacted by Congress." *Croson*, 488 U.S. at 518 (Kennedy, J., concurring in part and concurring in the judgment). For this reason, the Court in *Adarand* took the extraordinary step of overruling *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990), in order to restore the "long-held notion" that "all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny." *Adarand*, 515 U.S. at 225, 227. But even if the *Boerne* framework is used, §5 is not congruent and proportional, because it now *undermines* the nondiscrimination mandates of the Fourteenth and Fifteenth Amendments by encouraging segregated voting districts.

B. The Purposeful Creation Of Majority-Minority And "Electable" Minority Districts Requires Inherently Suspect Racial Classifications

In short, it is plainly improper to assess the validity of a federal law requiring a racial classification pursuant to the same standards used in *Morgan* or *Boerne* to analyze laws that lifted burdens on racial or religious groups. It seems quite obvious that a federal statute expressly mandating that States "create majority-minority districts even if this requires subordination of traditional districting principles" must be given far more searching analysis than a law that prohibits literacy tests as a prerequisite to voting. Yet the district court

proceeded as if *Morgan*'s endorsement of congressional power to eliminate barriers to voting through race-neutral means somehow resolves the separate question of whether Congress may require race-based redistricting under §5, even though, as detailed below, this Court has consistently warned that the Justice Department's interpretation of §5 raises serious constitutional questions under the Fourteenth Amendment and even though Congress altered §5 in 2006 to embrace the Department's expansive, race-conscious interpretation.

In fairness, there is potential for conceptual confusion in this regard, because the discriminatory "effect" prong of §5, when applied outside the redistricting or vote-dilution context, *is* simply a prophylactic prohibition against devices that exclude access to the ballot, and does not coerce racial favoritism or proportionality. Applying the "effect" prong to remove candidate filing fees or burdensome voting "qualifications" does not racially classify or disadvantage anyone, but simply eliminates headwinds that deny, albeit unintentionally, equal access. While the burden is eliminated because of its disparate impact on a minority group, the remedy does not impose any burden on nonminority voters—indeed, it advantages those nonminorities who were burdened by the requirement.

In contrast, when the "effect" analysis concerns the degree of a minority group's representation in the legislature—*i.e.*, whether overall minority voting strength has been "diluted"—then there is a clear potential for the discriminatory "effect" prohibition to require race-based line drawing and group

favoritism, rather than equal opportunity. A straightforward and inviolable prohibition against procedures that result in a disparate effect in a certain body—whether it is a workforce or school or legislature—is, of course, simply a requirement for proportional representation. In a community with 30% minority representation, a prohibition against making selection decisions with a disproportionate effect is simply a requirement that the workforce or school select 30% of the racial group—and is thus indistinguishable from numerical "goals" that the Court has invalidated under the Equal Protection Clause. *See Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2746 (2007); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 270, 284 (1986). In short, representation in a legislature, like that in a workforce or school, is a "zero-sum game" where a prohibition against representation falling below a certain percentage is a quota floor for the favored group and a quota ceiling for others.

Looked at another way, if the *remedy* for correcting the "effect" is to eliminate the barrier causing the effect, then government is not using race to classify or separate citizens. If the remedy is to use race to correct the effect, then government is utilizing this inherently suspect device. In redistricting, the remedy for failing to create majority-minority or "electable" minority districts is to create such race-conscious districts, just as school segregation is sometimes "corrected" (or avoided) through race-conscious school attendance lines and disproportionate representation in employment is corrected (or avoided) through "goals."

Section 5's principal and most important application is to redistricting plans, and the statute as amended prevents and remedies "dilutive" plans by mandating majority-minority or "electable" districts of the sort that have the potential to violate *Shaw*. This race-conscious mandate obviously cannot be judged by the same standards as race-neutral prohibitions of voting barriers, any more than a congressional statute mandating integrative "goals" of the sort invalidated in *Parents Involved* would be adjudged as if it merely foreclosed segregation. As *Morgan* itself noted, "an enactment authorizing the States to establish racially segregated systems of education would not be—as required by § 5—a measure 'to enforce' the Equal Protection Clause since that clause of its own force prohibits such state laws." 384 U.S. at 651 n.10. Because the Court has clarified repeatedly that the Equal Protection Clause also at least presumptively prohibits racial-balancing laws to "integrate" schools and redistricting plans that segregate voters to "benefit" minorities, *Morgan*'s exclusion of federal laws "authorizing" segregative, race-conscious line drawing from the ambit of Section 5 of the Fourteenth Amendment applies equally to these "benign" discrimination laws. After all, the whole point of strict scrutiny is to ensure that inherently suspect racial classifications truly do serve permissible ends in the most limited way—which cannot be determined if such measures are merely subject to the limited, deferential *Morgan* inquiry. *See Adarand*, 515 U.S. at 236 ("[R]equiring strict scrutiny is the best way to ensure that courts will consistently give racial classifica-

tions . . . detailed examination, both as to ends and as to means.").

C. Limiting §5 To The Retrogression Context Reduces Race-Conscious Redistricting

Cognizant of the danger that an effects test may mandate impermissible racial preferences or segregation, the Court has been careful to interpret the "results" and "effect" requirements of, respectively, §2 and §5 in a manner that attempts to avoid any such mandate. With respect to §2, the Court has consistently made clear that the only "'right'" under that statute "'is equality of opportunity, not a guarantee of electoral success for minority-preferred candidates of whatever race.'" *League of United Latin Am. Citizens v. Perry* (*LULAC*), 548 U.S. 399, 428 (2006) (plurality) (quoting *Johnson v. De Grandy*, 512 U.S. 997, 1014 n.11 (1994)). Thus, while §2 will frequently command the elimination of notoriously dilutive devices such as at-large systems, it plainly does not require proportional representation, 42 U.S.C. § 1973(b); *see also De Grandy*, 512 U.S. at 1014 n.11; *Thornburg v. Gingles*, 478 U.S. 30, 96-97 (1986) (O'Connor, J., concurring), or maximization, *De Grandy*, 512 U.S. at 1016-17, or the creation of minority districts if they are not compact, *Gingles*, 478 U.S. at 49-50, or if they depart from other "'traditional districting principles such as maintaining communities of interest and traditional boundaries,'" *LULAC*, 548 U.S. at 433 (quoting *Abrams v. Johnson*, 521 U.S. 74, 92 (1997)); *see also Miller*, 515 U.S. at 919, and otherwise requires a fact-bound focus on the "totality of circumstances,"

including the "tenuous[ness]" or strength of the "policy underlying the . . . practice," S. Rep. No. 97-417, at 29, 67 (1982), *as reprinted in* 1982 U.S.C.C.A.N. 177, 207, 246.

In short, properly interpreted, §2 ensures only *equal* treatment of minority voters by requiring minority districts (if the totality of circumstances so dictates) only where it is fair to presume that other groups would be provided a district in analogous circumstances—*i.e.*, when they constitute a majority of a district that is compact and consistent with traditional districting principles. *See Miller*, 515 U.S. at 920 ("'[W]hen members of a racial group live together in one community, a reapportionment plan that concentrates members of the group in one district and excludes them from others may reflect wholly legitimate purposes.'" (quoting *Shaw*, 509 U.S. at 646)). Conversely, since such naturally forming districts suggest only equal, rather than preferential, treatment, a "legislature's compliance with 'traditional districting principles such as compactness, contiguity, and respect for political subdivisions' may well suffice to refute a claim of racial gerrymandering." *Id.* at 919 (quoting *Shaw*, 509 U.S. at 647).

Similarly, and more to the point here, this Court has consistently interpreted §5 to avoid the "serious constitutional concerns," *Miller*, 515 U.S. at 926, directly raised by the Justice Department's persistent efforts to expand the statute into an open-ended vehicle for it to mandate race-based redistricting.

First, the Court has consistently interpreted §5 to focus only on the "limited" and manageable question

of whether the redistricting plan is retrogressive. *Bossier II*, 528 U.S. at 335. Thus, the relative comparison is between only two plans—the old plan and the new one. That is, there is only one "benchmark" for measuring minority voting strength—the existing plan. *Holder v. Hall*, 512 U.S. 874, 883-84 (1994). If the inquiry had been expanded to whether the plan "dilutes" minority voting strength relative to proposed alternative *new* plans, this would both enormously complicate the submitting jurisdiction's justification burden and expand the Justice Department's power to second-guess the State's redistricting decisions under the discriminatory "purpose" prong.

Specifically, the question of whether a jurisdiction has rejected a proposed alternative for the purpose of "diluting" minority voting strength first requires analysis of the proposed alternative to determine whether it better enhances minority electoral chances. It is "often complex in practice to determine" the right answer to this question, *Ashcroft*, 539 U.S. at 480, because it requires, at the district level, a complicated and imprecise analysis of nonminority and minority voting patterns to estimate what minority percentage is sufficient to make the district "electable" for a minority-preferred candidate and then, with respect to the overall plan, to resolve issues like whether a plan with three districts where minorities have a 50% chance of winning is less "dilutive" than a plan with two "safe" minority districts. This imprecise inquiry is then followed by an even more speculative and amorphous analysis of whether the alternative was rejected "'because of,' not

merely 'in spite of,'" its "dilutive" effect. *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979). While assessing the "purpose" of a multi-member body is difficult and imprecise in all circumstances, *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977) ("Rarely can it be said that a legislature . . . made a decision motivated solely by a single concern, or even that a particular purpose was the 'dominant' or 'primary' one."), it is extraordinarily open-ended and amorphous in the redistricting context because partisanship and incumbency both substantially overlap with race.[2]

In short, if §5 had been expanded beyond the relatively straightforward retrogression analysis, the preclearance assessment would entail a fact-bound, complicated inquiry into §2-type dilution issues and a subjective, open-ended assessment of the submitting

[2] As this Court's cases and the closely divided results therein illustrate, it is quite difficult to disentangle whether a legislature's purpose is racial or political or incumbency protection. For example, it is difficult to determine whether line drawing that helps protect an incumbent by shedding hostile voters (*e.g.*, *LULAC*, 548 U.S. at 423-24) or adding friendly ones (*e.g.*, *Easley v. Cromartie*, 532 U.S. 234, 252-53 (2001)) is racial or political; whether efforts to displace an incumbent from the opposite party are racial or political (*e.g.*, *LULAC*, 548 U.S. at 443-44); whether the creation of majority-minority districts is a dilutive effort to "pack" (*Ashcroft*, 539 U.S. at 481), an effort to maximize minority voting strength or an effort to advance Republican political interests in adjacent districts (*Voinovich v. Quilter*, 507 U.S. 146, 149-50, 153-154 (1993)); or whether diminution of minority percentages in majority-minority districts is an effort to dilute minority voting strength, to enhance it through increased "descriptive representation" (*Ashcroft*, 539 U.S. at 481), or to advance Democratic political interests (*id.* at 469-70).

jurisdiction's "purpose." And, as the Court has noted, this expanded standard would have raised serious constitutional concerns for two reasons.

First, "shift[ing] the focus of § 5 from nonretrogression to vote dilution, and . . . chang[ing] the § 5 benchmark from a jurisdiction's existing plan to a hypothetical, undiluted plan [would] exacerbate the substantial federalism costs that the preclearance procedure already exacts." *Bossier II*, 528 U.S. at 336 (internal quotation marks omitted). The covered jurisdictions already bear the difficult burden of proving the *absence* of discriminatory purpose and effect. *Reno v. Bossier Parish Sch. Bd.* (*Bossier I*), 520 U.S. 471, 480 (1997); *see also Elkins v. United States*, 364 U.S. 206, 218 (1960) ("[A]s a practical matter it is never easy to prove a negative."). To subject these jurisdictions to the equivalent of a full-blown §2 trial *plus* the burden of showing that hypothetical plans were not rejected for any racial reason (particularly in a context where race often must be considered and correlates directly with politics and incumbency, *see Bush v. Vera*, 517 U.S. 952, 1060-62 (1996) (Souter, J., dissenting)) would substantially increase the onerous burdens of preclearance, "perhaps to the extent of raising concerns about § 5's constitutionality." *Bossier II*, 528 U.S. at 876.

Second, and more important, extending §5 to outlaw a discriminatory non-retrogressive purpose, would authorize the Justice Department,[3] without

[3] "Although [§5] permits a covered state to obtain preclearance, via a declaratory judgment, from the United States District Court for the District of Columbia, . . . given the long period of

any judicial review, *see Morris v. Gressette*, 432 U.S. 491, 502-05 (1977), to find discriminatory purpose whenever a covered jurisdiction has failed to create a race-based district, even where the district is plainly at odds with traditional districting principles. And the 1990s redistricting cases demonstrate that the Department's conception of §5 leads to "discriminatory purpose" findings even though the State rejected a majority-minority district because it was inconsistent with those principles, thus requiring the race-based districts violative of *Shaw*.

During the 1990 redistricting cycle, the Department routinely denied preclearance to redistricting plans on the ground that States had failed to prove an absence of discriminatory purpose by their failure to maximize the number of majority-minority districts. The Court has frequently noted this practice and strongly warned that the "Justice Department's implicit command that States engage in presumptively unconstitutional race-based districting" raised "serious constitutional concerns" under both *Katzenbach* and the Fourteenth Amendment. *Miller*, 515 U.S. at 926-27.

In *Miller*, even though the Georgia legislature created one more majority-minority district than the prior plan, the Department still denied preclearance

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(continued…)

time it typically takes for such litigation, that alternative is rarely practical in the typical redistricting situation in which elections must be held within months of the enactment of the redistricting plan." *Johnson v. Miller*, 929 F. Supp. 1529, 1532 n.5 (S.D. Ga. 1996).

based on the State's failure to create yet another majority-minority district. *Id.* at 906-07, 924. Significantly, the State had shown that drawing the second new district would have violated standards of "compactness," *id.* at 919, but the Department nevertheless found that this proffered nondiscriminatory purpose was insufficient. As this Court noted, "[i]nstead of grounding its objections on evidence of a discriminatory purpose, it would appear the [Justice Department] was driven by its policy of maximizing majority-black districts." *Id.* at 924. The additional majority-minority district created to comply with the Department's demands, was a "[g]eographic[] . . . monstrosity," connecting "the black neighborhoods of metropolitan Atlanta and the poor black populace of coastal Chatham County, though 260 miles apart in distance and worlds apart in culture." *Id.* at 917.

Similarly, North Carolina submitted a plan that created the State's first majority-minority district. *Shaw v. Hunt* (*Shaw II*), 517 U.S. 899, 912 (1996). In its submission, the legislature proffered the following purposes behind its plan: "to keep precincts whole, to avoid dividing counties into more than two districts, and to give black voters a fair amount of influence." *Id.* But the Department denied preclearance on discriminatory purpose grounds, because the plan failed "to give effect to black and Native American voting strength in the south-central to southeastern part of the state." *Id.* at 902 (internal quotation marks omitted); *see also id.* at 912. As in Georgia, "the Justice Department was pursuing . . . the same policy of maximizing the number of majority-black

districts." *Id.* at 913. To satisfy the Department's demands, the legislature subsequently drew one majority-minority district that looked like a "'bug splattered on a windshield'" and a second district "wind[ing] in snakelike fashion" for 160 miles. *Shaw*, 509 U.S. at 635.

In Louisiana, the Department denied preclearance of the legislature's redistricting plan for state school board elections, claiming the legislature was acting with discriminatory purpose by not creating a new majority-minority district. *United States v. Hays*, 515 U.S. 737, 739-40 (1995). To prevent the Department from also rejecting its congressional redistricting plan, the legislature submitted a plan with a new majority-minority district that was "bizarre and irregular[ly] shape[d,] . . . cut[ting] across historical and cultural divides, split[ting] twelve of its fifteen parishes and divid[ing] four of the seven major cities of the State." *Hays v. Louisiana*, 862 F. Supp. 119, 121-22 (W.D. La. 1994). Similarly, the Texas legislature believed that the failure to draw a new majority-minority district "might be interpreted as retrogression under Section 5 of the Voting Rights Act." *Vera v. Richards*, 861 F. Supp. 1304, 1315 (S.D. Tex. 1994); *see also Vera*, 517 U.S. at 965-66.

Thus, it is clear that the Department interpreted §5 to authorize a finding of discriminatory purpose for the failure to create a majority-minority district, even where neutral districting principles supported the covered jurisdiction's decision. And, by effectively requiring such subordination of districting principles, it mandated the race-based line-drawing condemned

by *Shaw* and its progeny. Notably, after the 2000 *Bossier II* decision deprived the Department of its authority to find discriminatory purpose, the 2000 redistricting cycle did not produce a *single* instance where a court invalidated a redistricting scheme under *Shaw*. Yet, as we discuss more fully below, Congress in 2006, well aware of this reality, deliberately granted the Department the power to analyze non-retrogressive discriminatory purpose, and thus revived its well-established propensity to mandate race-based districts that violate traditional principles.

D. *Ashcroft* Interpreted §5's Retrogression Prohibition In A Way That Reduced Race-Conscious Redistricting

In addition to *Bossier II*, a second case, *Georgia v. Ashcroft*, 539 U.S. 461 (2003), confirmed that §5 did not mandate majority-minority districts, even in the retrogression context. In *Ashcroft*, the Court held that the proper retrogression inquiry should *not* "focus solely on the ability of a minority group to elect a candidate of choice." *Id.* at 485. Rather, the retrogression inquiry established under *Beer v. United States*, 425 U.S. 130 (1976), and its progeny—whether a voting change "would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise," *id.* at 141—is to be assessed under a "totality of circumstances" analysis akin to that used "in the § 2 context." *Ashcroft*, 539 U.S. at 480, 484-85. Just as the "'extent of the opportunities minority voters enjoy to participate in the political processes' is an important factor to consider in assessing a § 2

vote-dilution inquiry," the "same standard should apply to § 5." *Id.* at 485 (quoting *De Grandy*, 512 U.S. at 1011-12). Specifically, *Ashcroft* held that, "[i]n assessing the totality of the circumstances" for analyzing retrogression, *id.* at 480, the principal focus should be on three general factors: "the ability of minority voters to elect their candidate of choice, the extent of the minority group's opportunity to participate in the political process, and the feasibility of creating a nonretrogressive plan." *Id.* at 479.

By interpreting the effective exercise of the electoral franchise to encompass more than the mere ability to elect candidates—and, instead, to also include a broad-based inquiry into the totality of circumstances including "feasibility" and the opportunity to participate in all aspects of the political process—the Court obviously reduced, in a number of ways, the pressure on §5 jurisdictions to mechanically maintain majority-minority districts.

First, in contrast to the "United States'" myopic focus on the "comparative ability of black voters in the *majority-minority* districts to elect a candidate of choice," *id.* at 485-86 (emphasis added), courts should examine whether there has been an increase in minority voters' ability to elect in "coalition districts"—those "'in which minority citizens are able to form coalitions with voters from other racial and ethnic groups'" and thus have "no need to be a majority within a single district," *id.* at 481 (quoting *De Grandy,* 512 U.S. at 1020)—to "offset[] any decrease in black voting age population" in the majority-minority districts, *id.* at 487. Consequently, this decision reduced the pressure under §5 to

segregate voters into majority-minority districts, which reinforce the "'demeaning notion that members of the defined racial groups ascribe to certain 'minority views' that must be different from those of other citizens.'" *Miller*, 515 U.S. at 914 (citation omitted). Rather, the submitting jurisdiction has the option of creating integrated districts where minorities "'pull, haul, and trade to find common political ground, the virtue of which is not to be slighted in applying a statute meant to hasten the waning of racism in American politics.'" *Ashcroft*, 539 U.S. at 481 (quoting *De Grandy*, 512 U.S. at 1020).

Second, and more important, the Court held that the minority group's ability to "influence the political process" in ways wholly apart from "winning elections" was a "highly relevant factor" in the retrogression analysis, *id.* at 482 (internal quotation marks omitted), which ameliorated the requirement to draw electable districts in a race-conscious manner, whether those electable districts were majority-minority or coalition. Rather than having to manipulate district lines to ensure "electable" districts, a covered jurisdiction could avoid retrogression (in part) through integrated districts where "'candidates,'" although "'elected without decisive minority support,'" would nevertheless "'be willing to take the minority's interests into account.'" *Id.* (quoting *Gingles*, 478 U.S. at 100 (O'Connor, J., concurring in the judgment)). Thus, a State could choose to have "fewer minority representatives" without being deemed retrogressive if it had a correlative "increas[e] [in] the number of

representatives sympathetic to the interests of minority voters." *Id.* at 483. In addition, minorities' opportunity to participate politically, and the consequent "lack of retrogressive effect," could be established by showing that the districting plan maintains "legislative positions of power for minority voters' representatives" or that these representatives "support the new districting plan." *Id.* at 484.

Third, and perhaps most important as a practical matter, *Ashcroft* further reduced the pressure to engage in race-based redistricting by recognizing the relevance of traditional districting principles. Specifically, by clarifying that the *feasibility* of non-retrogressive plans was part of the retrogression analysis, the Court ensured that submitting jurisdictions were not required to subordinate those traditional principles to preserve majority-minority districts—a course of action that would trigger strict scrutiny. *Miller*, 515 U.S. at 920. Thus, as is often the case in a highly mobile society, if demographic changes render it less than "feasible" to maintain majority-minority districts that are compact and respect political boundaries, jurisdictions need not subordinate such traditional districting principles to maintain those districts. This, again, avoids interpreting §5 in a way that requires a presumptive violation of the equal protection guarantee recognized in *Shaw*.

Thus, in the context of retrogression, the Court adopted an analysis of "effective exercise of the electoral franchise" that parallels the §2 inquiry. Section 2 plaintiffs must show that, "based on the totality of circumstances," they have "less

opportunity . . . to participate in the political process *and* to elect representatives of their choice," 42 U.S.C. § 1973(b) (emphasis added), and also show that the alternative benchmark plan that allegedly creates greater opportunities complies with traditional districting principles such as compactness and preservation of political boundaries and communities of interest. *See Chisom v. Roemer*, 501 U.S. 380, 397 (1991). The *Ashcroft* "totality of circumstances" analysis, which emphasizes the ability to politically participate and the plan's feasibility, in addition to ability to elect, establishes a strikingly similar inquiry when comparing the new redistricting plan to the old one.

In sum, the Court has taken great care to interpret both the "effect" and "purpose" prongs of §5 in a way that would avoid both exacerbating the federalism costs of preclearance and violating the equal protection principles of the Fourteenth Amendment.

II. AS AMENDED, §5 RESURRECTS THE SERIOUS CONSTITUTIONAL CONCERNS THAT THIS COURT SOUGHT REPEATEDLY TO AVOID

In 2006, Congress not only *extended* §5's restrictions, it made them substantially more onerous in a way that was plainly designed to increase the pressure to maintain and create majority-minority districts or similar race-based districts. Congress "overturned" this Court's decisions in *Ashcroft* and *Bossier II*, *see* H.R. Rep. No. 109-478, at 93-94 (2006), and adopted the Justice Department's expansive interpretation of §5 that had been rejected in those cases. In so doing, it ensured that minority voters'

current ability to elect their favored candidates would be preserved in amber until 2031, regardless of intervening demographic or other changes, and authorized the Department to use its "discriminatory purpose" power to again require race-based districting that subordinates traditional districting principles. Thus, in 2012, the Department will again be able to force Georgia to create a third majority-black congressional district that ignores standard districting principles and to short-circuit any effort by the State to build upon its successful effort to depart from majority-minority districts in a manner that does not impede minority voters' equal political opportunities. So increasing the pressure on covered jurisdictions to engage in race-based redistricting both (1) raises constitutional concerns sufficiently significant to render inapposite *Katzenbach*'s endorsement of race-neutral efforts to eliminate discriminatory devices and (2) standing alone, shows that the new §5 cannot be congruent or proportional.

Section 5 previously required denial of preclearance only if a change had the purpose or effect of "denying or abridging the right to vote." 42 U.S.C. § 1973c (2005). The new §5 works a fundamental shift by requiring denial of preclearance if a change in a covered jurisdiction's election law "has the purpose of or will have the effect of *diminishing the ability* of any [minority group] . . . to *elect* their preferred *candidates* of choice." 42 U.S.C. § 1973c(b) (emphases added). Thus, "the relevant analysis . . . is a comparison between the minority community's ability to elect their genuinely preferred candidate of choice before and after a voting change."

H.R. Rep. No. 109-478, at 71. This change transforms the law from one that promotes full voting access for all into a statute that blatantly mandates probable success for the preferred candidates of certain racial groups.

It is quite clear that the newly amended §5 standard is a forbidden "guarantee of electoral success for minority-preferred candidates," rather than an effort to ensure "equality of opportunity." *LULAC*, 548 U.S. at 428. Under the new §5, certain select minority groups have a federal right to a certain level of electoral power—equivalent to that extant today—for the next three redistricting cycles (through 2031). This quota floor on the level of minority electoral success is, of course, necessarily a quota ceiling on nonminorities' ability to elect.

The draconian nature of this blunderbuss requirement is exacerbated by the fact that there is literally no defense or justification, no matter how compelling, that would authorize a jurisdiction to allow diminution of minorities' electoral power. Even if demographic changes—such as increased residential integration or migration of minorities from an urban core to the suburbs—rendered a prior majority-minority district completely unfeasible absent wholesale abandonment of traditional districting principles, the State would nonetheless be required to create the district or its functional equivalent. The statute contains no escape clause for "feasibility," and Congress consciously eliminated *Ashcroft*'s "feasibility" inquiry. Surely Congress could not amend Title VII's effects test to eliminate the "business necessity" justification without running

afoul of the Fourteenth Amendment, much less persuade anyone that this naked effects test could be imposed on State employers pursuant to Section 5 of that Amendment.

Moreover, unlike §2, which requires only that political processes be "*equally* open" and forbids only providing minorities with "*less* opportunity" than other groups, 42 U.S.C. § 1973(b) (emphases added), nothing in the new §5's "ability-to-elect" requirement reflects any notion of racial *equality*. It is simply a straightforward command to never diminish minorities' ability to elect, regardless of their current success level and regardless whether race-conscious voting by nonminorities played any role in diminishing their electoral fortunes.

There can be little doubt that the new §5 locks in all existing majority-minority districts until 2031, even though those districts raise serious Fourteenth Amendment concerns and, at best, were viewed as a temporary device to facilitate the Nation's transformation to a race-blind electoral system. Since virtually every majority-minority district is so completely uncompetitive that general elections are a mere formality, *see* Franita Tolson, *Increasing the Quantity and the Quality of the African-American Vote: Lessons for 2008 and Beyond*, 10 Berkeley J. Afr.-Am. L. & Pol'y 313, 336, 339-41 (2008), it would be virtually impossible to transform such districts into coalition or similar districts where minorities have merely a "probable" or equal ability to elect their preferred candidates. Transforming an electoral "lock" into anything resembling a marginally competitive district will, by definition,

"diminish" the ability of minorities to elect their preferred candidates.

Accordingly, for the next twenty-five years, minority voters *will* be "immune from the obligation to pull, haul, and trade to find common political ground" because they will reside in districts where they completely control the electoral outcomes. *De Grandy*, 512 U.S. at 1020. While that result undoubtedly served the naked political interests of the Republicans who controlled Congress in 2006 (because of the opportunities for Republican candidates in the overwhelmingly nonminority districts adjacent to majority-minority districts) and of minority congressional incumbents who, like all politicians, prefer "safe" districts, it certainly disserves the broad public interest in achieving a "transformation to a society that is no longer fixated on race." *Ashcroft*, 539 U.S. at 490. Congress's extravagant condemnation of the Court's decision upholding a Georgia redistricting plan that was only the beginning of an effort to create, in Representative Lewis' words, a "truly interracial democracy," *id.*, can only be viewed as expressing antipathy towards any system not grounded on the "sordid business [of] divvying us up by race." *LULAC*, 548 U.S. at 511 (Roberts, C.J., concurring in part, concurring in the judgment in part, and dissenting in part).

Indeed, in addition to effectively prohibiting the transformation of majority-minority districts into coalition or influence districts, the 2006 amendment further exacerbates racially preferential redistricting by also requiring the preservation of any such coalition districts. The plain language of the 2006

amendment does not limit its "ability-to-elect" requirement to majority-minority districts, and the legislative history confirms that the "no diminution" mandate applies to such districts. Congress made clear that a new redistricting plan must preserve a minority group's ability to elect its preferred candidates "either directly *or when coalesced with other voters*." H.R. Rep. No. 109-478, at 71 (emphasis added). Thus, while *Ashcroft* held that increases in coalition districts could be used to "*offset*[]" diminution in minority districts, 539 U.S. at 487 (emphasis added), the new §5 requires preservation of minority voting strength in *both* majority-minority and coalition districts.

Although there is no precise numerical definition of "coalition" or similar districts, the *Ashcroft* opinion, consistent with political science literature, noted that districts with a 30% black voting-age population are those in which "black voters as a group can play a substantial or decisive role in the electoral process." *Id.* at 487-88. It further noted that districts with only a 20% black voting-age population, but with an "overall percentage of Democratic votes of above 50%," are districts in which "black voters will constitute an effective voting bloc" where they can frequently, if not "always[,] elect the candidate of their choice." *Id.* at 489. Since such 20 to 30% districts provide minority voters with a likely, or certainly decent, ability to elect their preferred representative, and since there is no requirement in the new §5 that minorities "control" a district for the "no diminution" rule to apply, these districts must also be preserved.

As Justice Stevens correctly noted in *LULAC*, the 25.7% black citizen voting-age population district at issue there was, "at the very least," a "district where voters of color" could "'play a substantial, if not decisive, role in the electoral process'" and where blacks had consistently supported and elected a white Democrat. 548 U.S. at 479-80 & n.15 (Stevens, J., concurring in part and dissenting in part) (citation omitted). Accordingly, Justice Stevens concluded that this was a district where "blacks had the ability to elect candidates of their choice," and that Texas' failure to "offset[] this loss of a district with another district where black voters had a similar opportunity . . . was retrogressive" under §5. *Id.* at 479-80. Yet, as the *LULAC* plurality plainly stated, since there are such a large number of districts similar to the district at issue in *LULAC*, if the Voting Rights Act "were interpreted to protect this kind of influence, it would unnecessarily infuse race into virtually every redistricting, raising serious constitutional questions." *Id.* at 446. Congress nevertheless amended §5 to require precisely the analysis set forth in Justice Stevens' opinion.

Indeed, the number of such coalition or "ability-to-elect" districts will continue to steadily increase as white bloc voting continues to significantly decline throughout the country. Thus, *more* districts will have to be preserved under the new §5. The 2006 amendment's ultimate perversity, then, is that the more success a jurisdiction has in achieving the bi-racial coalitions and color-blind voting that the Voting Rights Act was designed to bring about, the greater the number of districts that will be subject to

the "no diminution in the ability to elect" standard. A law that *increases* federal race-conscious mandates in *inverse* proportion to the race-consciousness of the electorate is not rational, much less congruent and proportional or narrowly tailored to a compelling government interest.

Finally, the legislative history eliminates any ambiguity about Congress's nakedly racial purpose. That history, which describes the *Ashcroft* decision in derisive terms normally reserved for opinions such as *Plessy v. Ferguson*, 163 U.S. 537 (1896), makes it absolutely clear that Congress's conscious goal was to convert §5's retrogression analysis from a nuanced "totality of circumstances" analysis designed to achieve equality with limited race consciousness, into a wholly mechanistic and inflexible requirement to preserve majority-minority and similar districts. According to Congress, the evil of the *Ashcroft* decision was that it, forty years after §5 was enacted, actually "permitted [covered jurisdictions] to break up districts where minorities form a *clear* majority of voters and replace them with vague concepts such as influence, coalition, and opportunity." S. Rep. No. 109-295, at 19-20 (emphasis added). So allowing States to "spread minority voters" out of majority-minority districts would, according to Congress, "turn[] Section 5 on its head," "effectively shut minority voters out of the political process," "allow States to turn black and other minority voters into second class voters," "threaten[] the Nation's commitment to representative democracy," and "make Federal scrutiny a wasteful formality." H.R.

Rep. No. 109-478, at 69-70 (internal quotation marks omitted).

If Congress was this outraged by the notion of Georgia being allowed to take some baby steps away from super-majority black districts, it is quite clear that no State will be permitted to break up these districts. Consequently, minority voters will be locked into such districts until at least 66 years after §5 was enacted. Indeed, since there was "sound reason to conclude" in *Ashcroft* that "race was a predominant factor in drawing the lines," which "would doom a redistricting plan under the Fourteenth Amendment," 539 U.S. at 491 (Kennedy, J., concurring), Congress's conclusion that this plan was not *sufficiently* racial and dedicated to super-majority districts vividly demonstrates that the 2006 amendment is, at a minimum, a sufficiently serious threat to the "letter and spirit" of the Fourteenth Amendment to foreclose any sort of *Katzenbach*-type deferential review. Although the "purpose of the Voting Rights Act is to prevent *discrimination* in the exercise of the electoral franchise," *id.* at 490 (majority opinion) (emphasis added), the new §5 prevents not discrimination but any diminution in majority-minority districts, regardless of whether that serves a remedial purpose.

Moreover, not content with making the retrogression inquiry synonymous with perpetual preservation of majority-minority districts, Congress also expanded §5 to, for the first time, authorize invalidation of *improvements* to minority voting strength, if the Justice Department determines that the improvements were not sufficiently far-reaching

to maximize minority voting strength. While prohibiting intentional racial discrimination is obviously valid under the enforcement clauses of the Reconstruction Amendments, the question here is whether injecting a free-floating purpose inquiry into §5, and authorizing that it be administered by a Department with a proven track record of using that power to require at least presumptively unconstitutional racial districting, can be considered a congruent and proportional effort to enforce those amendments.

As this Court has noted, congruency and proportionality must be assessed in light of other alternative enforcement mechanisms. *See Boerne*, 521 U.S. at 530; *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 n.9 (2001) (noting, in a case holding that Title I of the ADA exceeded Congress's enforcement power, that other "federal recourse against discrimination" was available, such as actions by the United States for money damages or by private individuals for injunctive relief); *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 733-34, 737 (2003) (upholding FMLA in part because "Congress had already tried unsuccessfully to address this problem"). Intentional racial discrimination in voting can be and is successfully challenged under either under §2 or through §1983 suits to enforce the Fourteenth or Fifteenth Amendments. Since §5 fills no substantive gap not covered by those statutes, Congress's decision to expand §5 beyond its traditionally limited, "no retrogression" mandate serves no purpose other than gratuitously burdening States and allowing the

Department to find "purpose" when the States fail to maximize majority-minority districts. Congress certainly provided no reason why expanding the Department's jurisdiction was in any way needed to ferret out racially discriminatory voting actions that would somehow otherwise escape detection and remedy.

In short, confronted with a situation where the Department had serially transformed a nondiscrimination requirement into a maximization command, Congress chose to reinvigorate this regime and the serious constitutional concerns it created. As Justice Kennedy has presciently observed, there "is a fundamental flaw . . . in any scheme in which the Department of Justice is permitted or directed to encourage or ratify a course of unconstitutional conduct in order to find compliance with [§5]." *Ashcroft*, 539 U.S. at 491 (Kennedy, J., concurring). Here, the Department is both permitted and authorized by Congress to ratify and encourage unconstitutional line-drawing, in circumstances where any real discrimination in voting by a State would be more than adequately addressed under the Constitution and §2.

That final point bears emphasis because, even assuming *arguendo* that the 2006 amendments are not in severe tension with the substantive provisions of the Fourteenth Amendment, the mere fact that Congress expanded, in 2006, §5's substantive burdens and race-conscious incentives cannot possibly be congruent and proportional. No rational person would argue that public or private voting discrimination today remotely resembles the

situation in 1965. Thus, *broadening* the scope of the statute beyond retrogression and *increasing* the race-conscious activity needed to satisfy the non-retrogression standard is, almost by definition, an "unwarranted response" to any lingering vestiges of voting discrimination. *Boerne*, 521 U.S. at 530 (citing *Katzenbach*, 383 U.S. at 334). Because the "appropriateness of remedial measures must be considered in light of the evil presented," *id.*, and the evil presented now is but a shadow of that rampant in the 1960s South, it is clear that Congress's ratcheting up of §5's race-conscious burdens at this late date is plainly not a congruent or proportional effort to eliminate race from voting, but rather a misguided effort to perpetuate the segregation of races into separate districts.

For all of these reasons, the Court should find that §5, at least as applied to redistricting, cannot be judged under the standards set forth in *Katzenbach* or *Morgan*, but must satisfy strict scrutiny or at least be subject to a most searching judicial evaluation of ends and means. For all the factual reasons set forth above by Appellant, the new §5 would emphatically flunk any such test.

Finally, we emphasize that receiving the Court's guidance now on §5's constitutionality in the redistricting context is extraordinarily important. Redistricting will begin in 2011 and it is almost certain that the Court will not have another opportunity before then to consider the constitutionality of §5's application in that context. But embarking on a redistricting cycle without this

basic guidance will be extremely problematic for a number of related reasons.

First, as in the 1990s, the constitutional validity of §5, and the Justice Department's enforcement of it, will not be assessed by this Court until well after districting is already completed in all States. If §5 is unconstitutional with respect to redistricting, it is better for all involved to know this before the Department exercises its unconstitutional power to establish voting schemes that will likely govern throughout the next decade. Mid-decade adjustments to unconstitutional schemes are obviously quite difficult to accomplish. Moreover, if the 2006 changes render §5 unconstitutional, then Congress should be informed as soon as possible, so it has an opportunity to attempt to pass a race-neutral, congruent-and-proportional extension.

Perhaps more important, a number of Justices have indicated that compliance with §5 somehow constitutes a compelling government interest that justifies what would otherwise be a *Shaw* violation. *See LULAC*, 548 U.S. at 475 n.12 (Stevens, J., concurring in part and dissenting in part); *id.* at 518 (Scalia, J., concurring in the judgment in part and dissenting in part). This obviously makes it all the more important to know whether §5 is itself constitutional. Compliance with a statute that is not authorized under (or that violates) the Fourteenth Amendment plainly cannot provide a compelling government interest to violate the Fourteenth Amendment.

CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted,

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